In the

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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In the Matter of

RALPH L. STEPHENS,

Bankrupt.

Baash-Ross Tool Company, State Oil-fields Supply Company, Standard Pipe and Supply Company, A. D. Mitchell, Frances Hargrove, and Juanita Cook,

Appellants,

vs.

Ralph L. Stephens,

Appellee.

BRIEF OF APPELLEE.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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BRIEF OF APPELLEE.

Appellants have neglected to set out in their statement of facts an accurate record of the factual events before the Special Master, and we feel constrained to restate a portion thereof.

STATEMENT.

Ralph L. Stephens, the bankrupt, had a one-third interest in the Conservative Petroleum Corporation, a corporation, and was called upon by two of the objecting

creditors, Baash-Ross Tool Company and State Oilfields Supply Company, to guarantee the indebtedness of that corporation to them. In connection therewith two financial statements were given to Baash-Ross Tool Company, Objecting Creditors' Exhibits 1 and 2. Objecting Creditors' Exhibit 2 was made out because more detailed information was required. [Tr. p. 45.] Objecting Creditors' Exhibit 3 was given by the bankrupt to the attorney for State Oilfields Supply Company, wherein the bankrupt represented his financial worth to be $250,000.00. None of the other objecting creditors contend any false statements were made to them to secure money or credit.

At the time the aforesaid statements were given (they having been prepared from the bankrupt's records by Miss Smith) [Tr. p. 53], the indebtedness complained about had been created by Conservative Petroleum Company to said objecting creditors. No materials or credit were furnished thereafter to it by State Oilfields Supply Company, and Baash-Ross Tool Company, the other of said objectors, did not rely upon the financial statements, Exhibits 1 and 2. Mr. Neeley, credit manager of the Baash-Ross Tool Company, in company with the bankrupt, examined the property set out therein. [Tr. pp. 45 and 46; Opinion of Special Master, Tr. p. 69.]

Exhibit 4 is no part of the financial statements, is undated and unsigned, contains property deeded out before the financial statements 1, 2 and 3 were given [Tr. p. 31], was not prepared by the bankrupt [Tr. p. 29],

and was purported to have been given to the witness Raphael Dechter, the date not being disclosed by the record. [Tr. p. 30.]

No mention was made in the financial statements of a pending action against the bankrupt that subsequently resulted in a judgment against him approximating $17,000.00. [Tr. p. 33.] At time the financial statements were made out, a companion suit was pending on appeal to the California District Court of Appeal between the same parties, arising out of a Superior Court judgment in favor of the bankrupt, who was plaintiff, and against the defendant therein, for $256,162.20, with interest from July 11th, 1929. [Tr. p. 14.] As the bankrupt testified:

> "He owed me; I didn't claim I owed him." [Tr. p. 33.]

The record does not disclose what property of the bankrupt, either real or personal, sequestered by the receiver was turned over to the trustee.

After a careful examination of all of the evidence, the Special Master, before whom the issues were tried, made a direct finding against each and every specification asserted by the objecting creditors and recommended to the United States District Court that the bankrupt be given his discharge. [Tr. pp. 108-139.] Thereafter the same objectors filed with the United States District Court exceptions to the report of the Special Master [Tr. pp. 141-142], and upon a hearing thereon, said court overruled the exceptions, ordered the report of the Special Master confirmed [Tr. p. 144], and ordered the bankrupt discharged from his obligations. [Tr. p. 145.]

ARGUMENT.

Appellants have the temerity to refer only in part to the Special Master's opinion. We direct the court's attention to the whole thereof. [Tr. pp. 68 and 69.] They deliberately set out a portion thereof in such manner as to give a wrong complexion to the situation.

Appellants produced as a witness D. H. Culver, who testified as to certain real estate values of the bankrupt and admitted on *voir dire* that he had made no appraisal of this property in 1930, being the year the financial statements were made. He was testifying about values in 1933 and at a time when this country was engulfed in the most collossal depression the world has ever known. The fallaciousness of the witness' figures are apparent from the worth placed by him on 15 acres at Downey [Tr. p. 57], which he testified was worth $30,000.00, when the bankrupt had paid between $37,500.00 and $40,000.00 for it in 1925 or 1926 and had encumbered it by a first mortgage for $30,000.00 and had borrowed $15,000.00 additional in 1929 from the Associated Oil Company, secured by a second encumbrance thereon. [Tr. p. 60.]

The bankrupt testified he honestly believed the properties set forth in the financial statements to be worth the appraised value, as therein set out, basing this belief upon his experiences in the real estate business, in which such business he had been engaged for many years, and also had secured independent appraisals from others. [Tr. p. 47.]

The Special Master was well aware of the devastating effect the economic depression had upon the bankrupt's

property and refused to attach particular weight to the testimony of the witnesses produced by the objecting creditors, who testified as to property values and the methods employed by them. [Tr. pp. 35, 39 and 59.] The Special Master was the best judge of the credibility of witnesses and found as a fact that no false statements had been made by the bankrupt to secure credit from the objecting creditors or any of them. [Tr. p. 138.]

Appellants unfairly lay much stress upon a difference of some $43,000.00 in encumbrances upon property, as reflected by the Objecting Creditors' Exhibits 3 and 4. Objecting Creditors' Exhibit 4 purports to be nothing more nor less than a long-hand itemization of property at one time owned by the bankrupt, and prepared by the witness Smith. [Tr. p. 29.] Its accuracy may be attested to by Encumbrance 6 [Tr. p. 90], showing "Homestead, $10,000.00", an obvious error of $5000.00 [Tr. p. 4], which, together with the properties mistakenly included by the witness Smith, being items 4, 5 and 9, with the word "out" written thereafter [Tr. p. 90], showing encumbrances upon those respective pieces of property of $4633.13, $29,900.00 and $5747.47, or a total of $45,-280.60 (including the $5000.00 homestead error), said properties having been disposed of prior thereto and not used as a basis of credit. [Tr. pp. 30-31.]

The record shows that the bankrupt was continuously disposing of properties and acquiring other properties, so that the amount of encumbrances was a fluctuating one. Objecting Creditors' Exhibit 4 was a list of properties and reciprocal encumbrances at one time or another a part of the assets and liabilities of the bankrupt, not in any

sense a financial statement but on the contrary a mere recital of properties without in any way attempting to represent that they were contemporaneously owned, so that the addition of the values on the one hand or the encumbrances on the other is meaningless.

As the Special Master said, Exhibit 4 was no part of the financial statement. [Tr. p. 57.] The bankrupt was a member of certain syndicates [Tr. p. 31], and carried legal title to certain pieces of property in the names of others and by arrangement was not liable for the full amount of such indebtedness. [Tr. p. 31.] Contemporaneous deeds were delivered to him, which were held unrecorded and subsequently delivered to the trustee in bankruptcy upon his election. Appellants make a point of that fact. The bankrupt was the actual owner, which the objecting creditors admit. This presents an anomalous situation. They do not claim that he was not the owner of said property nor that he failed to account therefor in any way. Neither the Special Master nor the District Court found anything irregular with such an arrangement.

With reference to the claim, on which appellant puts considerable accent, that the bankrupt omitted from the financial statement (Exhibits 1 and 2), the $17,000.00 litigation which subsequently resulted in a judgment against him, it is to be observed that no objection is made by appellants to his failure to include in the financial statement an existing judgment in the sum of $256,-

162.20, with interest from July 11th, 1929, against the party who was suing him, and which larger judgment arose out of the same subject matter. [Tr. p. 14.] As hitherto mentioned, the bankrupt regarded the smaller litigation as being no more than a species of offset against the larger judgment in his favor, and he testified: "He owed me; I didn't claim I owed him." [Tr. p. 33.] In other words, in this cross litigation, the balance was heavily in the bankrupt's favor, and his explanation of the omission of the $17,000 litigation (which had not ripened into a judgment, while the $256,162.20 litigation had already ripened into a judgment in *his* favor) is perfectly consistent with innocence and good faith. So thought the Special Master and the United States District Judge.

> "To defeat a discharge on the ground that a bankrupt omitted obligations from a financial statement made by him, it is necessary to show either expressly or impliedly that he knew the obligations existed and could be enforced against him."
>
> *In Re Maaget,* 245 Fed. 804.

It is to be further observed that the bankrupt had a one-third interest in the Conservative Petroleum Company [Tr. p. 45], and did not include his oil holdings in the financial statements. [Objecting Creditors' Exhibits 1, 2 and 3, Tr. p. 48.] In speaking of his net worth, as shown by the financial statements, the bankrupt testified,

"Well, if my oil holdings were worth anything, I considered I was worth even more than that, and it did not include that, did not include those." [Tr. pp. 48-49.] In other words, the bankrupt wanted to be perfectly honest in making out the financial statements and did not include his oil holdings therein.

No part of the indebtedness owing to the objecting creditors was incurred by the bankrupt. It is all indebtedness of the Conservative Petroleum Company, a corporation. The indebtedness guaranteed by the bankrupt to the objector State Oilfields Supply Company was pre-existing at the time the financial statement, Exhibit 3, was given and no material or credit were furnished thereafter by that objector. [Tr. pp. 45 and 46.] Consequently there was no consideration therefor. Baash-Ross Tool Company, the other objector, to whom Exhibits 1 and 2 were given (Exhibit 2 being made out as more detailed information was required) did not rely upon them, as before any material was furnished or credit extended, it made an independent investigation of the credit standing of the bankrupt and examined the properties set out therein. [Tr. pp. 45 and 46; Opinion of Special Master, Tr. p. 69.] The other objectors do not contend false statements were made to them to secure money or credit.

False statements by a bankrupt set up to prevent bankrupt's discharge, must have been relied upon in relinquishing property or extending credit.

Bank of Monroe Nebraska v. Gleason, 9 Fed. (2nd) 520.

Appellate Courts Will Not Reverse Conclusions of a Special Master When Evidence Is Conflicting.

The findings of a Special Master or a referee, who has had the advantage of hearing the witnesses testify and observing their demeanor, which findings have been approved by the District Court, are conclusive upon the question of fact-finding and will not be disturbed, unless clearly erroneous.

Arenz v. Astoria Savings Bank (C. C. A. 9), 281 Fed. 530;

In Re Eilers Music House (C. C. A. 9), 270 Fed. 915, 925;

Carstens v. McLean (C. C. A. 9), 7 Fed. (2nd) 322;

Withers Bros. v. Foley (C. C. A. 9), 6 Fed. (2nd) 126.

"When matters are referred to a master or referee to make findings of fact, such findings are conclusive on petition for review or exceptions, unless not supported by sufficient evidence or contrary to law, and if the findings depend upon the credibility of witnesses, or are existent with any aspect of the evidence, they should be upheld."

In Re Fackler, 246 Fed. 864.

"Where the referee's finding is not a plain mistake and has been affirmed by the district court, it will not be disturbed."

John Schmitt's Sons v. Shadrach, 251 Fed. 874; 164 C. C. A. 90; writ of error dismissed, *Schmitt v. Shadrach,* 248 U. S. 538.

"Findings of the master, approved by the district court, should not be overthrown on review, unless there is obvious error therein."

S. L. Collins Oil Co. v. Central Trust Co., 18 Fed. (2nd) 474.

"A decree based upon the report of a special master who heard the evidence will not, in case of conflict, be disturbed on appeal."

Parker v. Ross, 234 Fed. 289.

"Findings of special master, upheld by trial court, based on conflicting evidence will not be disturbed, particularly where another finding disposing of appellant's contention was supported by evidence."

Emerson v. Fisher, 246 Fed. 642.

"The findings of the commissioner of the district court on an issue of fact approved by such district court will be regarded on appeal as, in effect, 'successive and concurrent decisions of two courts in the same case', and will not be disturbed."

Simpson's Patent Dry Goods Co. v. Atlantic & E. S. Co., 108 Fed. 425; writ of *certiorari* denied 183 U. S. 697.

"So far as it depends on conflicting testimony, or on the credibility of witnesses, or so far as there is any testimony consistent with the findings, a master's report must be treated as unassailable."

Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co., 28 Fed. 453.

"Findings of a master concurred in by the trial court will stand, unless some obvious error has in-

tervened in the application of the law or a serious mistake made in the consideration of the evidence."

Crawford v. Neal, 144 U. S. 585;

Mercantile Trust Co. v. Chicago P. & S. T. L. Ry. Co., 147 Fed. 699;

Lasscell Land & Lbr. Co. v. Wilson, 236 Fed. 322;

City of Memphis v. Postal Tel. & C. Co., 164 Fed. 600.

As was held in *Bank of Monroe Nebraska v. Gleason,* 9 Fed. (2nd) 520, the burden is upon the objectors to establish facts relied upon to prevent the bankrupt's discharge, and also: (a) False statement relied on to prevent bankrupt's discharge must have been made with knowledge of its falsity; (b) Bankrupt's fraudulent intent in making false statement relied upon to prevent discharge must be proved; and (c) False statement by bankrupt set up to prevent bankrupt's discharge must have been relied on in relinquishing property or extending credit.

In the case at bar the evidence showed that the objectors opposing bankrupt's discharge did not extend credit or faith of any kind upon the bankrupt's financial statement, but knew the true state of his affairs.

Reply to Argument of Appellants.

An examination of the appellants' authorities, on the facts and issues with which they were dealing, discloses that none of appellants' cases deal with a situation similar to the instant case. In each and every case cited by appellants, the report of the special master was upheld, except in the following two cases:

(1) *Morimura Co. v. Tabach,* 279 U. S. 24, where the court is very careful to say that the master made no findings of fact in reference to the precise issues, and

(2) *Swift v. Fortune,* 287 Fed. 491, where the bankrupt admitted his wrong but attempted to justify his position by saying he forgot to include in his financial statement the obligations in question and also listed property in the financial statement he did not own, which together with the inconsistent statements he had made under oath at the meeting of creditors led the court to conclude that the evidence showed the bankrupt knowingly and wilfully made false statements to secure credit.

We respectfully submit that the report of the Special Master and its confirmation thereof by the United States District Court should be affirmed.

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